TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1940~~ 1941

No. ~~536~~ 45

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALICE GRAY KALES

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1941
CERTIORARI GRANTED APRIL 28, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 826

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALICE GRAY KALES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In United States District Court for the Eastern District of Michigan, Southern Division

No. 14394

ALICE GRAY KALES, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Calendar entries

1936

July 7—Petition for return of Income Taxes filed. (Clerk's fees $5.00.)

July 20—Proof of service on The Attorney General, filed.

July 20—Proof of service on United States Attorney, filed.

July 9—Special Appearance of United States Attorney, filed.

Sept. 28—Motion to strike allegations in paragraph 3 (j) of Petitioner's Petition, filed.

Sept. 28—Motion to make more definite and certain, Allegations in paragraph 3 (g) and 3 (h), filed.

Sept. 28—Notice of Hearing on motion to make more definite and certain, and motion to Strike, October 19, 1936, filed.

Oct. 19—Order granting Motion to make more definite and certain, filed and entered—O'Brien J.

Oct. 19—Order granting Motion to strike, filed and entered—O'Brien J.

Nov. 2—Amended Petition filed.

Dec. 4—Motion to Dismiss, Notice of Hearing—January 11, 1937, filed. (Clerk's fees $5.00.)

2 1937

Jan. 14—Affidavit in opposition to Motion to Dismiss filed.

Jan. 16—Hearing on Motion to Dismiss, Arguments of Counsel, Case taken under advisement—O'Brien J.

1939

Feb. 18—Opinion of the Court filed—O'Brien J.

Feb. 27—Order of Dismissal filed and entered—O'Brien J.

May 3—Notice of Appeal filed. (Clerk's fees $5.00.)

May 3—Bond on Appeal, filed.

May 4—Proof of Mailing Notice of Appeal, filed.

May 4—Appellants Designation of Contents of Record on Appeal and Statement of Points to be Relied upon, filed.

June 1—Stipulation Re Abridgment of Transcript of Record and Waiver of Comparison, filed.

In United States District Court

Petition

Filed July 7, 1936

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Alice Gray Kales brings this her petition against the United States of America, pursuant to the provisions of Section 1122 of the Revenue Act of 1926, re-enacting the paragraph added by Section 1310 of the Revenue Act of 1921 at the end of Paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of District Courts as amended, and respectfully represents unto the Court and alleges that:

"(The original Petition has been abridged in accordance with District Court Rule 75 (e) to avoid duplication. Paragraphs 1, 2, 3 (a) to 3 (f), inclusive, 3 (h), 3 (i), 3 (k) to 3 (o), inclusive, 4 and 5, are the same as the corresponding numbered paragraphs of the Amended Petition which is set forth in full (Record pages 12 to 38) with the exception of the references to the exhibits. Exhibit A of the original Petition is the same as Exhibit A of the Amended Petition but two additional exhibits (B and C) were added to the Amended Petition in accordance with the Court's order of October 19, 1936, granting defendant's motion to make more definite and certain. Hence Exhibits B to J inclusive of the Original Petition correspond to and are the same as Exhibits D to L of the Amended Petition.

"Paragraph 3 (g) of the original Petition is the same as the first paragraph of Paragraph 3 (g) of the Amended Petition. Paragraph 3 (j) of the original Petition is set forth in full in defendant's Motion to Strike" (Record page 7).

Wherefore, Petitioner claims judgment against the defendant in the sum of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100ths ($195,710.44) Dollars, with interest thereon as provided by law.

ALICE G. KALES.

BEAUMONT, SMITH & HARRIS,
Attorneys for the Plaintiff,
2900 Union Guardian Bldg., Detroit, Michigan.

[*Duly sworn to by Alice G. Kales; jurat omitted in printing.*]

4 In United States District Court

Special appearance

Filed July 9, 1936

To the CLERK OF SAID COURT.

Now comes the United States of America, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Charles B. W. Aldrich, Assistant United States Attorney for said district, and appears specially in the above entitled cause.

JOHN C. LEHR,
United States Attorney.
CHARLES B. W. ALDRICH,
Assistant United States Attorney.

To BEAUMONT, SMITH & HARRIS,
2900 Union Guardian Building, Detroit, Michigan, Attorneys for Plaintiff:

Please take notice that the undersigned have this day appeared specially for the United States of America, defendant in the above entitled cause.

JOHN C. LEHR,
United States Attorney.
CHARLES B. W. ALDRICH,
Assistant United States Attorney.

Dated July 8, 1936.

5 In United States District Court

Proof of service of petition on Attorney General of the United States

Filed July 20, 1936

STATE OF MICHIGAN,
County of Wayne, ss:

William F. Kikhoefel, being first duly sworn, deposes and says that he is a resident of the City of Detroit; that on the 7th day of July, 1936, he mailed a true copy of plaintiff's petition in the above entitled cause to the Attorney General of the United States by registered letter by depositing said petition in the United States Post Office at Detroit, Michigan, registered mail, enclosed in a sealed envelope with legal postage thereon fully prepaid, and

addressed "The Attorney General, Department of Justice, Washington, D. C."

Further deponent saith not.

WILLIAM F. KIKHOEFEL.

Subscribed and sworn to before me this 18th day of July A. D. 1936.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

6 In United States District Court

Proof of service of petition on United States Attorney

Filed July 20, 1936

STATE OF MICHIGAN,
County of Wayne, ss:

Laurence A. Masselink, being first duly sworn, deposes and says that on the 7th day of July A. D. 1936, he personally served a true copy of plaintiff's petition in the above entitled cause upon John C. Lehr, United States Attorney in the District wherein the above suit is brought, by personally handing the same during business hours to Charles B. W. Aldrich, Assistant United States Attorney, who was then and there in charge of the civil matters of the United States Attorney's office for the Eastern District of Michigan.

LAURENCE A. MASSELINK.

Subscribed and sworn to before me this 14th day of July A. D. 1936.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

7 In United States District Court

Motion to strike

Filed September 28, 1936

Now comes the defendant, the United States of America, by John C. Lehr, United States Attorney, and respectfully moves the Court that the following allegations be stricken from the petitioner's petition:

All of the allegations contained in paragraph 3 (j) in said petition, reading as follows:

"Deficiencies were also asserted against other stockholders of the Ford Motor Company, who had sold their stock in 1919 for Twelve Thousand Five Hundred and no 100ths ($12,500.00) Dollars per share and who had also reported the profit derived thereon by using Nine Thousand Four Hundred Eighty-nine and 34 100ths ($9,489.34) Dollars as the March 1, 1913, value of said stock. These stockholders petitioned the United States Board of Tax Appeals for a redetermination of their 1919 income taxes and on, to-wit, May 5, 1928, in the case of James Couzens v. Commissioner, 11 B. T. A. 1040, the Board of Tax Appeals, an independent agency in the executive branch of the Government, determined that the fair market value of the Ford Motor Company stock on March 1, 1913, was Ten Thousand and no 100ths ($10,000.00) Dollars per share and this determination was thereafter followed in the cases of Rosetta V. Hauss v. Commissioner, 12 B. T. A. 755; Paul R. Gray v. Commissioner, 12 B. T. A. 916; Luman W. Goodenough, Executor and Trustee under Will of Philip H. Gray v. Commissioner, 12 B. T. A. 935; David Gray v. Commissioner, 12 B. T. A. 956; Horace H. Rackham v. Commissioner, 12 B. T. A. 1085; John W. Anderson v. Commissioner, 12 B. T. A. 1111; Estate of John F. Dodge v. Commissioner, 13 B. T. A. 201; and Anna T. Dodge, et al. Executors v. Commissioner, 13 B. T. A. 223. No appeals were ever taken from said decisions of the Board of Tax Appeals and petitioner is informed and believes that refunds were made by the United States to James Couzens, Rosetta V. Hauss, the Estate of John F. Dodge, Anna T. Dodge, et al. Executors, Horace H. Rackham, and John W. Anderson, based on the Ten Thousand and no 100ths ($10,000.00) Dollars March 1, 1913, value of the Ford Motor Company stock."

The said allegations comprising paragraph 3 (j) of the petitioner's petition are irrelevant, immaterial, redundant, and frivolous, since they refer to proceedings between parties entirely foreign to this proceeding and neither the petitioner nor the defendant in this proceeding were parties litigant in the proceedings referred to.

Wherefore, defendant moves the Court that said allegations comprising paragraph 3 (j) of the petitioner's petition be stricken.

In the event that this motion is overruled, defendant respectfully requests that an exception be allowed to it.

JOHN C. LEHR,
United States Attorney.

DAVID A. WOLFF,
Assistant United States Attorney.

9 In United States District Court

Motion to make more definite and certain

Filed September 28, 1936

Now comes the defendant, the United States of America, by John C. Lehr, United States Attorney, and moves that the petitioner herein be required to make her petition more definite and certain in order that the defendant may be informed as to the basis of the petitioner's alleged cause of action, and in order that defendant may be able to plead in response to petitioner's petition, which it is not in a position to do at this time owing to the failure of the petitioner in its petition to appraise the defendant of the facts.

The particular allegations in the petitioner's petition which the defendant moves the petitioner be required to make more definite and certain are as follows:

In paragraph 3 (g) of her petition, the petitioner alleges, "Thereafter, on March 24, 1925, petitioner paid said jeopardy assessment to Collector Fred L. Woodworth under written protest. On the same date, petitioner caused a duplicate of said written protest to be presented to the Commissioner of Internal Revenue."

In paragraph 3 (h) of her petition, petitioner alleges that, "At the time of filing and presenting said written protest, as aforesaid, petitioner included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and also with the Commissioner of Internal Revenue, a claim for refund * * *. Said claim for refund was duly filed on March 24, 1925, * * *."

Petitioner failed to attach to her petition as an exhibit said protest or claim for refund alleged by the petition, although numerous exhibits of other documents are attached to said petition.

It is, therefore, respectfully requested that petitioner be required to attach to her petition an exact copy of said protest and claim for refund, or that their exact contents be recited in the petition.

Petitioner has failed to allege any facts in respect to what action, if any, was taken by the Bureau of Internal Revenue upon said protest alleged to have been made under date of
10 March 24, 1925, to the Bureau of Internal Revenue, and has also failed to attach to her petition as an exhibit any communication from the Bureau of Internal Revenue showing what action, if any, was taken by the Bureau of Internal Revenue on said protest.

It is, therefore, requested that petitioner be required to allege those facts in respect to the action taken by the Bureau of Internal Revenue upon said alleged protest of March 24, 1925, and that petitioner be required to attach to her petition an exact copy of the communication from the Bureau of Internal Revenue showing what action was taken by the Bureau of Internal Revenue on said protest, or in the alternative, that the exact contents of said communication from the Bureau of Internal Revenue taking action on said protest be recited in the petition.

In the event that this motion is overruled, defendant respectfully requests that an exception be allowed to it.

JOHN C. LEHR,
United States Attorney.
DAVID A. WOLFF,
Assistant United States Attorney.

In United States District Court

Order granting motion to strike

Entered October 19, 1936

11 Defendant's motion to strike Paragraph 3 (j) of the petition filed in the above entitled cause having come on to be heard and after hearing argument of counsel,

It Is Ordered that said motion to strike be, and the same is hereby granted.

ERNEST A. O'BRIEN,
United States District Judge.

In United States District Court

Order granting motion to make more definite and certain

Entered October 19, 1936

Defendant's motion for an order to make petition more definite and certain having come on to be heard, and after hearing argument of counsel,

It is ordered that the said motion be, and the same is hereby granted, and that petitioner have 15 days from the date hereof to comply with the terms of this order.

It is further ordered that the petitioner attach to the said petition a copy of the protest or claim for refund alleged by the petitioner to have been duly filed on March 24, 1925, and that petitioner attach a copy of the communication, if any, received by

her from the Commissioner of Internal Revenue, acting upon said protest or claim for refund.

ERNEST A. O'BRIEN,
United States District Judge.

12 In United States District Court

Amended petition

Filed November 2, 1936

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Alice Gray Kales amends her petition in compliance with the Court's orders filed and entered in the above entitled cause on October 19, 1936, which orders granted defendant's motions to strike paragraph 3 (j) of her original petition and to make paragraphs 3 (g) and 3 (h) more definite and certain, to both of which orders petitioner respectfully takes exception, said original petition having been duly brought against The United States of America, pursuant to the provisions of Section 1122 of the Revenue Act of 1926, re-enacting the paragraph added by Section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of District Courts as amended, and without waiving said exceptions petitioner respectfully represents unto the Court and alleges that:

1. Petitioner is a citizen of the State of Michigan and resides in the City of Detroit within the Eastern District, Southern Division of said State.

2. The nature of petitioner's claim is for the recovery of One Hundred Ninety-five Thousand Seven Hundred Ten and 44 100ths Dollars ($195,710.44) in principal amount of income taxes illegally and erroneously assessed and collected from petitioner for the calendar year 1919, together with interest thereon.

3. The facts upon which said claim is based are as follows:

(a) On or prior to March 1, 1913, and continuously thereafter until July 7, 1919, petitioner owned 525 shares of the capital stock of Ford Motor Company. The March 1, 1913 value of said stock exceeded its cost or its fair market value at the time of acquisition by petitioner.

(b) On or about May 19, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, determined the March 1, 1913 value of the stock of the Ford Motor Company to be Nine Thou-

sand Four Hundred Eighty-nine and 34/100 Dollars
13 ($9,489.34) per share. Thereafter petitioner, on, to wit, July 7, 1919, sold the aforesaid 525 shares of Ford Motor Company stock for the sum of Twelve Thousand Five Hundred Dollars ($12,500) per share.

(c) On, to wit, March 10, 1920, petitioner received a letter from John A. Grogan, Collector of Internal Revenue at Detroit, Michigan, granting her an extension of thirty (30) days from March 15, 1920, for filing her Personal Income Tax Return for 1919, a true copy of said letter being attached hereto, marked Exhibit "A", and made a part hereof. By virtue of said thirty-day extension, the due date for filing petitioner's 1919 Income Tax Return became and was April 14, 1920.

(d) On March 25, 1920, petitioner filed her 1919 Income Tax Return, showing an income tax due in the amount of One Million Two Hundred Sixteen Thousand Eighty-six and 26/100 Dollars ($1,216,086.26). Said tax was fully discharged in four installments paid to Collector John A. Grogan on March 25, 1920, June 14, 1920, September 13, 1920, and December 15, 1920.

(e) The fair market value on March 1, 1913 of said 525 shares of Ford Motor Company stock was, and is, Ten Thousand and no/100 Dollars ($10,000) per share and not Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share as determined by Commissioner Roper, but acting under the duress of said Roper's determination petitioner computed the profit on the sale of the aforesaid Ford Motor Company stock on her 1919 Income Tax Return to be the difference between Twelve Thousand Five Hundred Dollars ($12,500) and Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share. As a consequence of the under valuation of the March 1, 1913 value of said Ford Motor Company stock, petitioner over reported the profit on the sale of said stock by Two Hundred Sixty-eight Thousand Ninety-six and 50/100 Dollars ($268,096.50) and overpaid the income taxes legally due and owing by her for 1919 in the principal amount of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), no part of which has been as yet refunded to her.

(f) Collector John A. Grogan went out of office on, to wit, November 27, 1921, and petitioner is informed and believes that
14 he died on, to wit, November 30, 1923, and that no probate was ever had of his estate. He was succeeded by Collector Fred L. Woodworth who went out of office on, to wit, August 15, 1933, and who is still out of office.

(g) On or about March 13 or 14, 1925, a jeopardy assessment was made against petitioner in the amount of Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) for the year 1919, on the alleged ground that she had understated the profit on the sale of the said 525 shares of Ford Motor Company stock by Three Million Five Hundred Ninety-nine Thousand Fifty-three and 50 100 Dollars ($3,599,053.50). Thereafter, on March 24, 1925, petitioner paid said jeopardy assessment to Collector Fred L. Woodworth under written protest. On the same date, petitioner caused a duplicate of said written protest to be presented to the Commissioner of Internal Revenue.

In compliance with the terms of the Court order of October 19, 1936, to which petitioner respectfully takes an exception, Exhibit B is attached hereto, which exhibit petitioner is informed and believes, is a true copy of the aforesaid written protest. After payment of the aforesaid jeopardy assessment, petitioner received a letter dated April 6, 1925, from the Treasury Department, a copy of which is hereto attached and marked Exhibit C.

(h) At the time of filing and presenting said written protest, as aforesaid, petitioner included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and also with the Commissioner of Internal Revenue, a claim for refund of the excessive income taxes that had prior thereto been erroneously and illegally assessed and collected from her for the year 1919, on account of the sale of said 525 shares of Ford Motor Company stock, setting forth the grounds, among others, that the March 1, 1913 value of said stock was greatly in excess of Nine Thousand Four Hundred Eighty-nine and 34 100 Dollars ($9,489.34) per share and that petitioner had included in her 1919 Income Tax Return more taxable profit than was derived by her on said sale. Said claim for refund was duly filed on March 24, 1925, and within five years from the date petitioner's 1919 Income Tax Return was due.

(i) On, to wit, June 4, 1925, petitioner filed a separate claim for refund for the Two Million Six Hundred
15 Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) paid under protest to Collector Woodworth on March 24, 1925, as aforesaid, and in the subsequent litigation against Collector Woodworth both the United States District Court for the Eastern District of Michigan and the United States Circuit Court of Appeals for the Sixth Circuit, held that the aforesaid jeopardy assessment of Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) was illegal and void.

(j) (Paragraph j of the original petition was stricken by court order filed and entered October 19, 1936, to which order petitioner respectfully takes an exception.)

(k) On, to wit, September 24, 1928, and prior to any action being taken by the Commissioner of Internal Revenue on the refund claim filed March 24, 1925, petitioner filed an amendment to said refund claim in the manner and form prescribed by law, a copy of which amendment is hereto attached, marked Exhibit "D," and made a part hereof. Said amendment was based upon the same grounds stated in the original refund claim of March 24, 1925, and specified the March 1, 1913, value of the Ford Motor Company stock to be Ten Thousand Dollars ($10,000) per share, instead of Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) as determined by Commissioner Roper and used on petitioner's 1919 Income Tax Return. The overpayment of petitioner's 1919 income taxes was computed to be One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), said sum being the normal tax of eight percent (8%) and the surtax of sixty-five percent (65%) on Two Hundred Sixty-eight Thousand Ninety-six and 50/100 Dollars ($268,096.50), said sum being the difference between the fair market price or value of the said 525 shares of Ford Motor Company stock on March 1, 1913, at Ten Thousand Dollars ($10,000) per share and the Roper valuation used by petitioner on her 1919 Income Tax Return, at Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share.

(l) On, to wit, September 24, 1928, petitioner did also file a judgment claim, in the principal amount of Two Million
16 Six Hundred Twenty-seven Thousand Three Hundred Nine and 05/100 Dollars ($2,627,309.05), based upon the judgment theretofore taken against Collector Woodworth on account of the illegal jeopardy assessment collected by him on March 24, 1925, as aforesaid, and said judgment, together with certain interest, was paid on, to wit, November 13, 1928.

(m) Thereafter, on, to wit, June 13, 1929, a hearing was held on the amended refund claim of March 24, 1925, before the General Counsel for the Bureau of Internal Revenue, pursuant to the General Counsel's letter of June 5, 1929, a copy of which is hereto attached, marked Exhibit E and made a part hereof. Briefs were filed on behalf of petitioner and the matter of the disposition of said amended claim for refund was taken under advisement. From time to time, petitioner's counsel was advised by the General Counsel of the Bureau of Internal Revenue that attention would be given to said claim and that an effort would be made to reach a conclusion and dispose of the matter. Copies

of letters from the General Counsel dated February 7, 1933, July 31, 1933, and February 9, 1935, are hereto attached, marked Exhibits F, G, and H, and made a part hereof.

(n) More than six months have expired since the filing of the aforesaid claim for refund on March 24, 1925, and the amendment filed on, to wit, September 24, 1928, and the commencement of this suit, and no notice of the disallowance of said claim has been mailed to petitioner by registered mail by the Commissioner of Internal Revenue. Under date of June 4, 1935, petitioner did receive a letter from the Commissioner, by ordinary mail, a true copy of which is hereto attached, marked Exhibit I and made a part hereof. Under date of August 5, 1935, petitioner replied thereto, a true copy of said reply being hereto attached, marked Exhibit J and made a part hereof, and under dates of August 9, 1935, and August 20, 1935, petitioner received two letters from the Deputy Commissioner, true copies of which are hereto attached, marked Exhibits K and L and made a part hereof.

In Exhibit L it was erroneously assumed that the suit referred to in said Exhibit was based upon the refund claim filed March 24, 1925, and it was erroneously stated, among other things, that an attempt was made on September 21, 1928, to amend the claim for refund which gave rise to the litigation and judgment claim for refund, whereas the litigation in the Eastern
17 District of Michigan was brought against Collector Fred L. Woodworth based upon a claim for refund filed on, to wit, June 4, 1925. In said Exhibit L it was also erroneously stated that the refund claim filed in 1925 was merged into the judgment secured against the United States, whereas the judgment which petitioner obtained was not against the United States but was against Collector Woodworth. It was further erroneously stated in Exhibit L that the Bureau had not considered or treated the so-called amendment as a claim, whereas the Bureau, through its General Counsel and its officers and agents, had always treated said amendment and the refund claim of March 24, 1925, as claims from the time they were filed.

(o) No part of the aforesaid One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44) of income taxes overpaid for the year 1919 has been refunded to the petitioner.

4. By virtue of the aforesaid, the United States became and now is indebted to the petitioner in the full amount of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), with interest as provided by law.

5. No action other than as aforesaid has been had on said claim in Congress or by any of the Departments; no act, action,

suit or process is pending for or in respect to petitioner's claim in any other court against any person acting or professing to act mediately or immediately under the authority of the United States; no person other than petitioner is the owner thereof or interested therein; no assignment or transfer of this claim or of any part thereof or interest therein has been made; petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and effects; the petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion; petitioner is a citizen of the United States and believes the facts as stated in this petition to be true.

Wherefore, petitioner claims judgment against the defendant in the sum of One Hundred Ninety-five Thousand Seven Hundred Ten and 44 100 Dollars ($195,710.44), with interest thereon as provided by law.

ALICE G. KALES.

18 BEAUMONT, SMITH & HARRIS,
Attorneys for Plaintiff.

Business Address: 2900 Union Guardian Bldg., Detroit, Michigan.

[*Duly sworn to by Alice G. Kales; jurat omitted in printing.*]

Exhibit A

TREASURY DEPARTMENT.
INTERNAL REVENUE SERVICE.
Detroit, Michigan, March 10, 1920.

MRS. ALICE GRAY KALES,
Detroit, Mich.

For reasons stated in your letter, you are hereby granted an extension of 30 days from March 15, 1920 for filing your (Personal) Income Tax Return for 1919.

19 Your attention is invited to the following extract from Section 250 of the Revenue Act of 1918 as finally completed by Congress:

"Where an extension of time for filing a return is granted, the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for payment of any installment is at the request of the taxpayer thus postponed, there

shall be added as part of such installment interest thereon at the rate of one-half of one per centum per month from the time it would have been due if no extension had been granted until paid."

This letter or a copy thereof must be attached to the return when filed.

Respectfully,

JOHN A. GROGAN, *Collector.*

Exhibit B

DETROIT, MICHIGAN, *March 23, 1925.*

To FRED L. WOODWORTH,

Collector of Internal Revenue, Detroit, Michigan.

DEAR SIR: I hereby protest against the assessment of deficiency tax levied against me as evidenced in notice dated March 14, 1925, on the ground that it is erroneous and illegal, and payment is hereby made under duress and solely to prevent the imposition of penalties threatened and the attachment of my property.

I protest against said assessment of said alleged deficiency and the payment of said tax for the following particular reasons, without however, waiving any other or further grounds or reasons for this protest.

1. The assessment of said alleged deficiency is illegal and contrary to the law.

2. The assessment of said alleged deficiency was made without giving the taxpayer notice of said deficiency or of a proposed assessment as provided in Section 274 of the Revenue Act of 1924 and without the taxpayer having the opportunity for sixty days after such notice to appeal from the determination of the Commissioner to the Board of Tax Appeals, likewise as provided in said Section 274, and the Assessment of said alleged deficiency is, therefore, illegal and void.

3. The Revenue Act of 1924 authorizes a deficiency assessment only when "the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay." There is in this case no such jeopardy, either according to the letter or to the spirit of the law. The impending expiration of the period of limitations is not such jeopardy. There is no ground whatever, legal or otherwise, for any belief by the Commissioner that the assessment or collection of the alleged deficiency would be jeopardized by delay, and the assessment is for that reason illegal and void.

4. The assessment of this alleged deficiency is based upon a reopening and reversal and setting aside of a previous assessment of the taxpayer's 1919 income tax and the final finding or decision as to the March 1, 1913, value of the stock of the Ford Motor Company made by a previous Commissioner of Internal Revenue, who was duly authorized to decide claims against the Government and to fix and assess the amount of taxes due from this taxpayer and to find and determine the essential facts in the computation of said tax. There is no authority given by the law to the present Commissioner to reopen and reverse or set aside the said findings and determinations of the previous Commissioner. And the assessment of the alleged deficiency is for this reason illegal and void.

21 5. The prior assessment against the taxpayer of her 1919 tax was computed on certain income which included income derived from the sale of certain shares of Ford Motor Company stock. This latter income was computed by deducting from the sale price of the stock a certain value thereof as of March 1, 1913. This value was fixed by the then Commissioner of the Internal Revenue Department and the Secretary of the Treasury without any consultation with or assistance in any way from this taxpayer, and a representation as to such value was made to this taxpayer by the Government prior to said sale of said stock as an inducement that this taxpayer sell said stock. The proposal of the Government was that if the taxpayer would sell her said stock, the Government would accept her payment of income taxes computed on the basis of its said determination of said value of said stock as of March 1, 1913. This proposal the taxpayer accepted and relying upon said agreement sold her stock and paid her tax in accordance with said agreement.

The transaction, therefore, is an executed agreement between the taxpayer, the Government and Mr. Henry Ford in which the Government received a valuable consideration. It cannot now be set aside and the alleged deficiency assessment is for that reason illegal and void.

6. The prior assessment against the taxpayer of her 1919 tax was computed on certain income which included income derived from the sale of certain shares of Ford Motor Company stock. This latter income was computed by deducting from the sale price of the stock a certain value thereof as of March 1, 1913. This value was fixed by the then Commissioner of Internal Revenue and approved by the Secretary of the Treasury without any consultation with or assistance in any way from this taxpayer and a representation of such value was made to this taxpayer by

the Government as an inducement that this taxpayer sell said stock. This representation was made prior to said sale, and it was this representation which did induce this taxpayer to dispose of her stock. The Government having made this representation and it having been so acted upon, the sale of the stock consummated and the tax paid, the assessment of said tax cannot now be reopened and set aside and the alleged deficiency assessment is for that reason illegal and void.

22 7. This taxpayer made no statement or representation to the Government as to the March 1, 1913, value of said Ford Motor stock. This taxpayer accepted the finding and determination of the Government as to said value in good faith and as a basis for an inducement of said sale and made the sale of the said stock to Mr. Henry Ford, relying on said finding of the Government. This taxpayer having thus acted in entire good faith cannot now be penalized, and having accepted the Government's finding and determination and having consummated the sale of the said stock in reliance thereon and having paid the tax so assessed as a result thereof, she cannot now be compelled to pay an additional alleged deficiency tax. And the assessment of the alleged deficiency is illegal and void.

8. Daniel C. Roper, Commissioner of Internal Revenue, without any request from this taxpayer and without any information obtained from this taxpayer or representation made by her, but solely from data obtained by him fixed a certain value of the Ford Motor Company stock as of March 1, 1913. Thereafter in writing he advised this taxpayer of that value and that if this taxpayer should sell her said stock in said Ford Motor Company, her taxable profit would be the difference between the value so fixed and the sale price. In reliance on said representation this taxpayer sold her stock and made her return in accordance with such representation. The Government of the United States accepted the return, and assessed the tax upon the value so fixed and notified this taxpayer quarter-annually of the amount of the tax so computed on said basis. This taxpayer thereafter paid the tax as thus determined by the Government, and the payments were accepted by the Government in full settlement of said assessment. The taxpayer cannot now recover back her stock. The Government in making the deficiency assessment affirms that not only was the tax which was paid properly paid and that it will be retained by the Government, but also that an additional and deficiency tax must be paid. The taxpayer, therefore, if the position of the Government is correct, cannot be put in statu quo. The Government, therefore, having induced by its official acts and representations that said taxpayer sell the stock and pay said tax, is estopped from reopening, reversing

or setting aside the determination of value as of March
23 1, 1913, made by Daniel C. Roper, Commissioner of In-
ternal Revenue, and the assessment of the tax upon that basis and is estopped from assessing as against this taxpayer a deficiency based upon a new and different valuation of said Ford Motor Company stock as of March 1, 1913.

9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9.489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1,
1913, made by the Department as aforesaid and approved
24 by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising

from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation.

You are likewise advised that this taxpayer will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same and for such other and further relief to which she may be entitled.

Yours very truly,

ALICE G. KALES.

25 *Exhibit C*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:R:P: EAB.

TREASURY DEPARTMENT,
Washington, April 6, 1925.

MRS. ALICE H. KALES,
c/o Beaumont, Smith & Harris, 1122 Ford Building, Detroit, Michigan.

MADAM: This office is in receipt of your protest against the assessment of deficiency in tax as levied against you for the year 1919 in the amount of $2,627,309.05.

In reply, you are advised that in view of the fact that the Statutory period within which the Commissioner might assess additional taxes for the year 1919 was about to expire, it was necessary in order to protect the interest of the Government to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924. Under the provisions of Section 279 (a) of the Revenue Act of 1924 a claim for abatement may be filed within ten days after the issuance of the demand notice by the Collector.

When the claim has been received in this office, it will be assembled with the case and given prompt consideration.

Inasmuch as the records of this office fail to disclose he receipt of power of attorney authorizing Beaumont, Smith and Harris to represent you in matters pertaining to your income tax liability, the information is furnished you direct.

Respectfully,

G. J. BRIGHT,
Deputy Commissioner.

26 *Exhibit D*

(Execute Separate Form for Each Tax Period)

AMENDMENT TO CLAIM FOR

x Refund of Taxes Illegally Collected.

STATE OF MASSACHUSETTS,
County of Barnstable, ss.

ALICE G. KALES,
1730 Burns Ave., Detroit, Michigan.
1124 Ford Building, Detroit, Michigan.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.....
2. Character of assessment or tax—Income on sale of Ford Motor Co. stock—Period: January 1, 1919 to January 1, 1920.
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax liability requested (Income and Profits Tax)..... $.....
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)—$195,710.44 and interest at 6% per annum on each quarterly payment made as follows: March 25, June 14, Sept. 13 and Dec. 15, 1920.
8. District in which return (if any) was filed—First District of Michigan.
9. District in which unpaid assessment appears.....

27 10. Amount of overpayment claimed as credit..... $.....

11. Unpaid assessment against which credit is asked; period from..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

See attached sheets containing reasons.

(Attach additional sheets if necessary.)

ALICE G. KALES.

Sworn to and subscribed before me this 11th day of September 1928. IDA M. TAYLOR, *Notary Public.*

My Commission Expires May 4, 1934.

STATE OF.....,
County of..... ss.

AMENDMENT TO CLAIM FOR REFUND

Filed March 24, 1925.

On or prior to March 1st, 1913, and continuously thereafter until July 7th, 1919, deponent owned 525 shares of capital stock of Ford Motor Company. On or about July 7th, 1919, she sold this stock for Twelve Thousand Five Hundred ($12,500.00) Dollars per share. On or about May 19, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, determined a value of the stock of the Ford Motor Company as of March 1, 1913, at Nine Thousand Four Hundred Eighty-nine and 34/00 ($9,489.34) Dollars and indicated that this value should be used in computing any profits made on the sale thereof. Deponent believed that this Roper valuation was less than the fair market price or value of said stock on March 1st, 1913, but in compliance with said Roper valuation and under the duress thereof, deponent included in her income tax return for the year 1919, as taxable income, the difference between the sale price of $12,500.00 per share and the Roper valuation of $9,489.34 per share. Deponent obtained a thirty-day extension for filing her 1919 income tax return, thus fixing the time in which said return was due at April 14, 1920. She filed said return on March
28 26, 1920, and she paid the tax under the duress of said Roper determination on the difference between $12,500.00 per share and $9,489.34 per share, in four installments in March, June, September, and December of 1920.

On or about March 13th or 14th, 1925, a jeopardy assessment amounting to Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05/100 ($2,627,309.05) Dollars was levied against her by the then Commissioner of Internal Revenue on the alleged ground that she had underpaid her income tax for the year 1919 on the sale of said stock. Thereupon, a ten-day notice and demand was served upon her. On to wit, the 24th day of March 1925, she paid said jeopardy assessment under protest. At the time of the filing of said protest she included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and presented to the Commissioner of Internal Revenue a claim for refund of income taxes erroneously and illegally assessed and collected against her in 1920 on ac-

count of the sale of said 525 shares of Ford Motor Company stock and on account of her having included in said return more profit than was derived from the sale of said Ford stock and by reason of the inclusion of the Roper valuation as a basis under the duress thereof. Said claim for refund was filed on March 24, 1925, and within five years from the date said return was due and is as follows:

"Protestant while insisting for the reasons among others above stated that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had Protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon Protestant she will also claim that the running of the Statute of Limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

29 Both the United States District Court at Detroit and the United States Circuit Court of Appeals for the Sixth Circuit have held that said jeopardy assessment of March 14, 1925, was illegal and void. The United States Board of Tax Appeals has fixed and determined a fair market price or value of the stock of the Ford Motor Company as of March 1st, 1913, at Ten Thousand ($10,000.00) Dollars per share and has determined that $10,000.00 per share was the basis for determining profit on the sale thereof. No action has been taken by the Commissioner of Internal Revenue on deponent's claim for refund filed on March 24, 1925. Deponent avers that the fair market price or value of said stock on March 1, 1913, was and is $10,000.00 per share.

Deponent hereby amends said claim for refund and alleges the foregoing facts are amendatory and supplemental thereto and avers that there was erroneously and illegally assessed against her and collected from her in 1920, under the duress of the Roper determination, alleged income taxes amounting to One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 ($195,710.44) Dollars, being the normal tax of 8% and the surtax of 65% on the difference between the fair market price or value of said stock on March 1, 1913, which was and is $10,000.00 per share, and was fixed by the Board of Tax Appeals at $10,000.00 per share, and the Roper determination of $9,489.34 per share.

Deponent avers that for the reasons aforesaid, said $195,710.44, together with interest thereon at 6% per annum from the several dates of payment in 1920, should be refunded to her.

Deponent reserves the right to allege any other or further reasons by amendment or otherwise.

(Signed) ALICE G. KALES.

Sworn to and subscribed by me this 11th day of September A.D. 1928.

(Signed) IDA M. TAYLOR,
Notary Public, Barnstable County.

My Commission expires May 4, 1934.

30 *Exhibit E*

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue And Refer to GC:A 233850.

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
Washington, June 5, 1929.

MR. HAL H. SMITH,
Union Trust Building, Detroit, Michigan.

SIR: Pursuant to your request, you will be given an opportunity to present oral argument on the pending refund claim filed by Alice G. Kales, which claim is predicated upon the finding of the Board of Tax Appeals of the March 1, 1913, value of the stock of the Ford Motor Company. A hearing will be accorded you on the 13th of the current month, at 10:30 a.m., unless you find it inconvenient to be present at that time, in which event, kindly advise me promptly, suggesting another date more convenient to you.

Respectfully,

(Signed) C. M. CHAREST,
General Counsel.

31 *Exhibit F*

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
Washington, February 7, 1933.

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue and refer to GC:WHT A-233850.

MR. A. BROOMFIELD,
% Messrs. Beaumont, Smith & Harris,
Union Guardian Building, Detroit Michigan.

SIR: Pursuant to your oral request of a few days since, there is enclosed herewith an office copy of amendment to the refund

claim of Alice G. Kales, the jurat date of the amendment being September 11, 1928.

At the time of your recent call you were advised that early attention would be given to Mrs. Kales' claim, as requested in letter of your partner, Mr. Smith, dated January 17th last.

Respectfully,

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Enc. 69564.
sdr.

22 *Exhibit G*

TREASURY DEPARTMENT.
BUREAU OF INTERNAL REVENUE.
Washington, July 31, 1933.

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue and refer to GC:I:WHT A-233850.

BEAUMONT, SMITH & HARRIS,
Counselors at Law,
Union Guardian Building, Detroit, Michigan.

(Attention: Mr. Hal H. Smith.)

SIRS: Receipt is acknowledged of your letter of July 13th relating to the claim of Alice G. Kales. It is hoped that a conclusion may be reached in the matter at an early date.

Respectfully,

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

33 *Exhibit H*

Office of Assistant General Counsel. Address Reply to Assistant General Counsel For Bureau of Internal Revenue And Refer to GC:I:WHT A-233850.

TREASURY DEPARTMENT.
BUREAU OF INTERNAL REVENUE.
Washington, February 9, 1935.

Messrs. BEAUMONT, SMITH & HARRIS,
Union Guardian Building, Detroit, Michigan.

(Attention Mr. Hal H. Smith.)

SIRS: Receipt is acknowledged of your letter of January 23rd, inquiring as to the present status of the refund claim of Alice

G. Kales. You are advised that every effort will be made to reach a conclusion and dispose of the matter within a few weeks.

Respectfully,

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

sdr.

34 *Exhibit I*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to

TREASURY DEPARTMENT,
Washington, June 4, 1935.

MRS. ALICE G. KALES,
c/o Hal H. Smith,
1122 Ford Building, Detroit, Michigan.

MADAM: Under date of September 21, 1928, you filed a Form 843, apparently intended by you to constitute a claim for refund of $195,710.44 income taxes for the year 1919.

The records of the District Court of the United States, Eastern District of Michigan, Southern Division, disclose that under date of June 12, 1928, judgment was entered in your favor by that court in the principal amount of $2,627,309.05, together with interest and costs, representing an overpayment of your tax for the year 1919. A check in settlement of this judgment was issued under date of November 10, 1928.

In view of the foregoing, the Bureau is precluded from giving further consideration in any respect to the matter of your income tax liability for the taxable year 1919.

Respectfully,

(Signed) GUY T. HELVERING,
Commissioner.

WM EKP.

35 *Exhibit J*

HARWICH PORT, MASS., *August 5th, 1935.*

Honorable GUY T. HELVERING,
Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: This will acknowledge receipt of your letter of June 4, 1935, to me in the matter of my Claim for Refund of $195,710.44 income taxes for the year 1919. I construe your letter to be a disallowance of my Claim for Refund and I would kindly ask you if I am correct in this assumption.

Very truly yours,

(Signed) ALICE G. KALES.

Copy of letter sent to Com. Internal Revenue.

36 *Exhibit K*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:C:CC:3-HHG.

TREASURY DEPARTMENT,
Washington, August 9, 1935.

Mrs. ALICE G. KALES,
Harwich Port, Massachusetts.

In re Year 1919

MADAM: Receipt is acknowledged of your letter dated August 5, 1935, relative to your claim for refund of income tax.

Careful consideration will be given to your communication and you will be advised at the earliest practicable date, of the action taken.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.
By (Signed) S. A. MITCHELL,
Chief of Section.

37 *Exhibit L.*

Office of Commission of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:E:RRR.

TREASURY DEPARTMENT,
Washington, August 20, 1935.

Mrs. ALICE G. KALES,
Harwich Port, Massachusetts.

MADAM: Further reference is made to your letter dated August 5, 1935, relative to the refund of $195,710.44, income taxes paid for the year 1919.

The records of the Bureau indicate that you filed a judgment claim dated September 21, 1928, in the principal sum of $2,627,309.05, based upon the decision of the District Court of the United States for the Eastern District of Michigan, affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on May 10, 1928. There was also filed by you on September 21, 1928, a form purporting to be an amendment to a claim for refund filed March 24, 1925, presenting the contention that a further refund should be allowed in the amount of $195,710.44. Thus, after filing suit based upon the claim filed in 1925 and obtaining judgment for the full amount claimed, an attempt was made on September 21, 1928 to amend the claim for refund which

gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year.

The refund claim filed in 1925 was merged into the judgment secured by you against the United States and you were, therefore, precluded from filing an amendment to the earlier claim which had been finally adjudicated.

38 The Bureau has not considered or treated the so-called amendment as a claim and consequently there was no necessity for a disallowance as suggested by you. The adjudication by the court removed this matter from the realm of administrative action other than to make refund as directed by the judgment.

Respectfully,

(Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

In United States District Court

Motion to dismiss

Filed December 4, 1936

Comes now the defendant, The United States of America, by John C. Lehr, United States Attorney, and respectfully moves the Court to dismiss this alleged cause of action for the following reasons, to wit:

A. This Court has no jurisdiction of this action, since the plaintiff's suit is barred by the Statute of Limitations and by the provisions of Section 3226 of the Revised Statutes of the United States, because—

(1) No claim for refund was filed within the period of the Statute of Limitations. The document attached to the plaintiff's amended petition, marked Exhibit B, which is a protest of the plaintiff dated March 23, 1925, neither constitutes nor includes a claim for refund.

(2) The claim for refund filed by the plaintiff with the Commissioner of Internal Revenue on September 21, 1928, was filed after the Statute of Limitations had expired and can not serve as a basis for this suit.

39 (3) In the alternative, even if the protest of March 23, 1925, attached to the plaintiff's amended petition, marked Exhibit B, were to be considered a claim for refund, the denial of said protest by the Commissioner of Internal Revenue, shown by the Commissioner's letter of April 6, 1925, attached to the plaintiff's amended petition, marked Exhibit C, constituted a re-

jection of said alleged claim for refund. Neither suit nor an amended claim was filed thereafter within the period of the Statute of Limitations.

(B) In the alternative, this alleged cause of action should be dismissed by this Court even if the protest of March 23, 1925, attached to the plaintiff's amended petition, marked Exhibit B, were to be considered as constituting a claim for refund, since said claim became extinguished by virtue of its merger with the judgment rendered in favor of the plaintiff in this Court under date of June 12, 1928, against Fred L. Woodworth, Collector of Internal Revenue, which judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit. (26 F. (2d) 178.) Plaintiff filed a claim for the payment of said judgment under date of September 21, 1928, and a Treasury check in full settlement and payment of this judgment was issued to the plaintiff under date of November 10, 1928.

Wherefore, defendant moves the Court to dismiss this alleged cause of action.

JOHN C. LEHR,
United States Attorney.
TRENT MCMATH,
Assistant United States Attorney.

40 In United States District Court

Affidavit in opposition to motion to dismiss

Filed January 14, 1937

STATE OF MICHIGAN,
County of Wayne, ss.

Archibald Broomfield, being first duly sworn, deposes and says that he is a member of the law firm of Beaumont, Smith & Harris and is familiar with the various income tax matters of Alice Gray Kales, particularly with regard to the year 1919.

On March 24, 1925 deponent wrote to the Commissioner of Internal Revenue on the stationery of Beaumont, Smith & Harris, the following being a copy of the original of said letter together with the endorsements placed thereon by the Bureau of Internal Revenue:

"RP—John W. Beaumont, Hal H. Smith, Julian H. Harris, Charles Wright, Jr., Archibald Broomfield, Albert E. Meder, Thomas B. Moore.

Percy J. Donovan, Melville C. Mason, Roy H. Curtiss, Marion S. Harlan, Charles H. McIntyre, U. George Krapfel, Yates G. Smith, Joseph A. Vance, Jr.

BEAUMONT, SMITH & HARRIS,
COUNSELORS AT LAW, 1122 FORD BUILDING.
Detroit, Mich., March 24, 1925.

HON. DAVID H. BLAIR,
Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: As attorneys for Alice G. Kales, of this city, we are herewith filing with you the protest of Alice G. Kales dated
41 March 23, 1925, a duplicate of which was this day delivered to Fred L. Woodworth, Collector of Internal Revenue at Detroit. Will you kindly acknowledge receipt of same? Your very truly,

BEAUMONT, SMITH & HARRIS,
By A. BROOMFIELD.

AB S.
Enc.
Called 235—3-31-25 308069.
Ch'd to Sol. 7-18-24 Mar. 1925 Spec. 5 Page 0 Line 4.
No record of Power.

$2,627,309.05 h 1 "

Exhibit B attached to plaintiff's amended petition is a copy of the protest referred to in deponent's letter of March 24, 1925.

Thereafter, under date of April 6, 1925, G. J. Bright, Deputy Commissioner, in response to the request in deponent's letter of March 24, 1925, that he kindly acknowledge receipt of the protest, did so acknowledge receipt, a true copy of said letter being attached to plaintiff's amended petition and marked Exhibit C.

Exhibit B attached to plaintiff's amended petition, being the aforesaid protest in which was contained a claim for refund, was retained by the Commissioner without any objection as to the sufficiency of that part of the protest giving notice of the overpayment of Mrs. Kales' 1919 income taxes, and at no time prior to the filing of defendant's motion to dismiss was a claim ever made that Exhibit C attached to plaintiff's amended petition, being the Deputy Commissioner of Internal Revenue's letter of April 6, 1925, constituted a rejection of the refund claim contained in the aforesaid Exhibit B.

Before any action was taken by the Commissioner of Internal Revenue on the claim for refund contained in the aforesaid Exhibit B, the plaintiff in the above-entitled cause caused to be filed with the Commissioner of Internal Revenue and the Collector of Internal Revenue, a formal amendment to the claim for refund filed March 24, 1925, in the amount of $195,-

710.44, a true copy of which is attached to plaintiff's amended petition marked Exhibit D.

42 *Affidavit in Opposition to Motion to Dismiss*

On, to wit, June 13, 1929, deponent and Mr. Hal H. Smith, attorneys for the plaintiff, attended a hearing at Washington, D. C., before the Honorable C. M. Charest, General Counsel for the Bureau of Internal Revenue, in response to the hearing fixed by the said General Counsel in his letter of June 5, 1929, a copy of which is attached to plaintiff's amended petition and marked Exhibit E. Present also at said hearing and representing the Commissioner of Internal Revenue, was Mr. W. Hall Trigg, Special Assistant. A full hearing on the merits of Mrs. Kales' claim for refund was held at this meeting A voluminous brief was filed on her behalf supporting her contentions that the protest, Exhibit B, was a sufficient informal claim for refund, that it was filed within the statutory period and was sufficient to support the subsequent amendment filed on, to wit, September 24, 1928, and that the suit and judgment against Collector Fred L. Woodworth for the amount of the jeopardy assessment in the principal amount of $2,627,309.05 did not bar the claim for the refund of the $195,710.44 excess income taxes paid during the year 1920.

During deponent's argument on the question of the sufficiency of the protest Exhibit B, the General Counsel stopped deponent and stated that they were satisfied that said protest was sufficient to constitute an informal claim for refund and that it was filed within the statutory period.

Thereafter, under date of June 21, 1929, deponent prepared and forwarded to the General Counsel of the Bureau of Internal Revenue, a supplemental brief wherein it was stated:

"We understand that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund; that the amendment to this informal claim for refund filed on September 11, 1928, sufficiently complies with the requirements of the statute and the regulations so that it is now admitted that the taxpayer's claim for refund is proper both as to time of filing and formal requirements. The sole question is as to whether or not the proceedings in the District Court were of such a nature that this claim for refund cannot now be allowed

43 * * *." Said supplemental brief was retained by the Bureau of Internal Revenue and no exceptions ever taken to the aforesaid statements. Thereafter, on June 24, 1929, the

General Counsel for the Bureau of Internal Revenue acknowledged receipt of said supplemental brief and stated that it would receive careful consideration.

On, to wit, January 27, 1933, deponent again had a conference with a member of the staff of the General Counsel of the Bureau of Internal Revenue, who again reiterated that they were satisfied that the informal claim was filed in time and that it was good as an informal claim, and deponent was informed that the delay in acting was due to the fact that the Bureau were considering certain claims of Mrs. Kales' brothers.

After said conference, deponent received the letter of February 7, 1933, from C. M. Charest, General Counsel of the Bureau of Internal Revenue, being Exhibit F attached to plaintiff's amended petition.

On June 18, 1935, deponent again conferred with a member of the staff of the General Counsel for the Bureau of Internal Revenue with regard to the contents of the Commissioner's letter of June 4, 1935, being Exhibit I attached to plaintiff's amended petition, and said representative expressed surprise at its form and contents and stated that he had previously recommended to the former General Counsel Charest that plaintiff's claim for refund be allowed.

Deponent further says that upon a trial of the above entitled cause the plaintiff is in a position to prove in court all of the facts found by the United States Board of Tax Appeals in the case of James Couzens, 11 B. T. A. 1040, and in particular the matters set forth in the footnote to the opinion of the United States Circuit Court of Appeals, Sixth Circuit, in the case of Woodworth, collector, v. Kales, 26 F. (2d) 178, particularly with regard to the information possessed by the Commissioner of Internal Revenue in 1919 regarding the March 1, 1913, value of the Ford Motor Car Company's stock, which information the Commissioner received from examinations made of the books and records of the Ford Motor Car Company.

Deponent further says that on or about the time that the aforesaid jeopardy assessment of $2,627,309.05 was made against
44 plaintiff in the above entitled cause, that it is a matter of record that the Commissioner of Internal Revenue was still investigating the March 1, 1913 value of the said Ford Motor Car Company stock, and that the aforesaid jeopardy assessment was made before the investigation was completed by reason of the fact that the statutory period within which the Commissioner might have assessed additional taxes for 1919 was about to expire.

Deponent further says that after further investigation the Commissioner of Internal Revenue on or about November 3, 1925, re-

determined the March 1, 1913, value of the Ford Motor Car Company stock to be $3,547.84 per share instead of $2,634.00 per share, the amount used in computing the aforesaid jeopardy assessment, and deponent is informed and believes that the matter of the March 1, 1913 value of the Ford Motor Car Company stock was under consideration by the Commissioner of Internal Revenue up to and including the commencement of the hearing before the United States Board of Tax Appeals in the case of James Couzens, 11 B. T. A. 1040, which hearing commenced on January 11, 1927.

As a result of said hearing, the Board of Tax Appeals determined on, to wit, May 5, 1928, that the March 1, 1913 value of the said Ford Motor Car Company stock was $10,000 per share, and that no appeal was taken from said decision.

Deponent is further informed and believes that as a result of the March 1, 1913 value of $10,000 per share so determined by the Board, that refunds were made to other stockholders of the Ford Motor Car Company, to wit: James Couzens, Rosetta V. Hauss, John F. Dodge Estate, Anna T. Dodge, et al., Executors, Horace H. Rackham and John W. Anderson.

Deponent further says and charges the fact to be that the Commissioner of Internal Revenue well knew that if the March 1, 1913 value of the Ford Motor Car Company stock was in excess of $9,489.34, as determined by Commissioner Roper and used by plaintiff on her 1919 income tax return, that plaintiff did thereby overpay the amount of income taxes legally due for that year, that the Commissioner of Internal Revenue had in his files in March 1925, more information regarding the March 1, 1913, value of the Ford Motor Car Company stock than plaintiff possessed, and the Commissioner having also the claims
45 of the various other stockholders of the Ford Motor Car Company involving the March 1, 1913, value of the Ford Motor Car Company stock was not misled or prevented from making further investigations of said March 1, 1913, value by reason of the plaintiff not fixing in dollars and cents the March 1, 1913 value of the Ford Motor Car Company stock in the protest filed March 24, 1925, being Exhibit E attached to plaintiff's amended petition.

Further deponent said not.

ARCHIBALD BROOMFIELD.

Subscribed and sworn to before me this 12th day of January 1937.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

In United States District Court

Opinion

Filed February 18, 1939

This matter came on for hearing on defendant's motion to dismiss plaintiff's cause of action on the ground that (1) no claim was filed within the period of limitations (the document attached to plaintiff's amended petition being a mere protest and not a claim for refund); (2) that even if such document be considered a claim for refund, that the Commissioner's letter of April 6, 1925 constituted a denial and hence plaintiff's proposed amended claim for refund filed in September 1928, was not timely; and (3) that the alleged cause of action became extinguished by virtue of the judgment rendered in favor of
46 plaintiff in this Court on June 12, 1928, which was affirmed by the Circuit Court of Appeals for the Sixth Circuit (26 Fed. (2) 178).

In regard to defendant's first ground, the controlling issue is whether the protest (Exhibit B attached to amended declaration) filed March 24, 1925, was an informal or defective claim for refund that could be perfected by amendment filed September 24, 1928.

It is plaintiff's claim that said protest was an informal claim for refund upon which the Commissioner had not taken any action thereon prior to September 24, 1928, and hence by virtue of the amendment to the claim which was filed prior to action by the Commissioner, the claim became timely perfected. The plaintiff cites as principal authorities in support of her contention United States v. Memphis Cotton Oil Co., 288 U. S. 62, and United States v. Factors & Finance Co., 288 U. S. 89. In each of the above cited cases the objection was made that the earlier claim was defective for failure to state the grounds for which the refund was demanded and the Court held that the general claim for refund in specifying grounds was subject to amendment until finally rejected, irrespective of limitations running in the interim. In both cases there was clearly a definite and present claim for refund.

The important facts in the case at bar set forth in the pleadings are as follows. In 1919 plaintiff and other stockholders of Ford Motor Company, contemplating the sale of their stock for $12,500.00 a share and wishing to know the basis for such stock so that they could compute tax liability before sale, applied to the Commissioner of Internal Revenue, who, in May of 1919, determined that the fair market value of said stock as of March 1, 1913 was $9,189.34 per share. Plaintiff completed the sale in

1919 of 525 shares of said stock at $12,500.00 per share and filed her income tax return showing a profit on said stock of approximately $3,000.00 per share, using the March 1, 1913 value as previously fixed by the Commissioner as the basis, and paid a tax of $1,216,086.26. On or about March 13, 1925 a jeopardy assessment was made by the then Commissioner of Internal Revenue against plaintiff in the sum of $2,627,309.05 for the year 1919, on the grounds that she had understated the profit on the sale of the Ford Motor Company stock, claiming that the March 1, 1913 value was much less than the $9,489.34 reported by plaintiff and previously agreed to by the former Commissioner of Internal Revenue. On March 24, 1925 plaintiff paid said jeopardy assessment to Fred L. Woodworth as Collector of Internal Revenue under written protest filed with him, and caused a duplicate of such protest to be presented to the Commissioner of Internal Revenue. It is this written protest that plaintiff claims constitutes an informal claim for refund.

Thereafter on June 4, 1925 petitioner filed a claim for refund for the $2,627,309.05 as paid under protest as aforesaid, and in subsequent litigation brought in this Court it was held that said jeopardy assessment was illegal and void. This decision was affirmed by the Circuit Court of Appeals for this Circuit in Woodworth v. Kales, 26 Fed. (2) 178, and said $2,627,309.05 with interest was paid by the United States to plaintiff on November 13, 1928.

In litigation before the Board of Tax Appeals, brought by other Ford Motor stockholders, in which plaintiff was not involved, the March 1, 1913 value of the Ford Motor Company stock was determined to be $10,000.00 James Couzens v. Commissioner, 11 B. T. A. 1040.

The plaintiff's claim for refund in suit at bar is based upon her alleged error in reporting the basis of said stock to be $9,489.34 per share as originally determined by the Commissioner, rather than $10,000.00 per share as determined by the Board of Tax Appeals.

As I have said, the question is whether or not plaintiff's protest could be considered an informal claim for refund. The pertinent parts of said protest, in the form of a letter to the Collector, read as follows:

DETROIT, MICHIGAN, *March 23, 1925.*

To FRED L. WOODWORTH,
Collector of Internal Revenue, Detroit, Michigan.

DEAR SIR: I hereby protest against the assessment of deficiency tax levied against me as evidenced in notice dated March

48 14, 1925, on the ground that it is erroneous and illegal, and payment is hereby made under duress and solely to prevent the imposition of penalties threatened and the attachment of my property.

I protest against said assessment of said alleged deficiency and the payment of said tax for the following particular reasons, without however, waiving any other or further grounds or reasons for this protest.

1. The assessment of said alleged deficiency is illegal and contrary to the law.

(Here follow numerous grounds upon which said protest is based).

9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that *if* it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34 and that therefore this taxpayer should recover from

49 the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Sec-

retary of the Treasury should stand, yet if for any reason a re-valuation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetuated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such re-valuation.

You are likewise advised that this taxpayer will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same and for such other and further relief to which she may be entitled.

Your very truly,

ALICE G. KALES.

On April 6, 1925, the Commissioner wrote plaintiff as follows:

APRIL 6, 1925.

MRS. ALICE H. KALES,
c/o Beaumont, Smith & Harris,
1122 Ford Building, Detroit, Michigan.

MADAM: This office is in receipt of your protest against
50 the assessment of deficiency in tax as levied against you for the year 1919 in the amount of $2,627,309.05.

In reply, you are advised that in view of the fact that the Statutory period within which the Commission might assess additional taxes for the year 1919 was about to expire, it was necessary in order to protect the interest of the Government to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924. Under the provisions of Section 279 (a) of the Revenue Act of 1924 a claim for abatement may be filed within ten days after the issuance of the demand notice by the Collector.

When the claim has been received in this office, it will be assembled with the case and given prompt consideration.

Inasmuch as the records of this office fail to disclose the receipt of power of attorney authorizing Beaumont, Smith and Harris to represent you in matters pertaining to your income tax liability, the information is furnished you direct.

Respectfully,

G. J. BRIGHT,
Deputy Commissioner.

It is the opinion of this Court that the plaintiff's said letter of March 24, 1925, is not a claim for refund, informal, defective, or otherwise, but is merely a protest with a statement of intention to later file a claim, in the event certain contingencies happen in the future. Nowhere in said letter does plaintiff claim a refund, no demand is made for the return of any tax paid, and it is not under oath. The letter calls for no action on the part of the Commissioner, but only contemplates possible future action by plaintiff. At best it is merely an expression of an intention that she will claim an additional amount, in the future, under certain conditions.

The record is devoid of anything showing that the Commissioner of Internal Revenue or the taxpayer acted upon it or in any way regarded it as other than a protest. Commissioner's letter of April 6, 1925 clearly shows that he treated it merely as a protest and informed plaintiff of her right to file a claim in abatement. The Courts have consistently held that pro-
51 tests could not be considered as informal claims for refund.

See Semmes Motor Co. v. United States, 67 C. Cls. 631;

Mutual Trust Life Ins. Co. v. United States, 45 F. (2) 288;

Pine Hill Crystal Spring Water Co. v. United States, 58 F. (2) 506;

Anderson v. United States, 6 F. Supp. 851;

International Arms & Fuse Co. v. United States, 37 F (2) 771.

As was said by the Circuit Court of Appeals for the Second Circuit in Art Metal Const. Co. v. United States, 47 F. (2) 558, certiorari denied, 283 U. S. 863:

"To allow him (the taxpayer) to substitute, not a claim, but a warning that he may in the future make a claim which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether."

It is also significant that in the last paragraph of said letter of protest plaintiff states definitely that she would make claim for refund for the deficiency tax therewith paid, and shortly thereafter, to-wit, June 4, 1925, she did file a claim for refund for $2,627,309.05, being the full amount paid by plaintiff under said protest, but, made no mention of amount claimed here. If plaintiff had considered said protest a claim for refund it would have been unnecessary to file such. However, the fact that she did file such claim for refund shows that plaintiff did not consider such protest a claim for refund. She took no action and filed no claim for refund for the tax here involved until September 1928, after the Board of Tax Appeals determined the March 1, 1913 value to be $10,000.00 per share. It would appear that

plaintiff determined to claim further refund after the Board of Tax Appeals had found the March 1, 1913 value to be $10,000.00, which would be perfectly proper were it not for the statute of limitations.

Plaintiff has laid much stress upon the fact that the Commissioner never rejected or acted upon plaintiff's protest prior to filing what it called an amended claim for refund in September of 1928. It seems to the Court that Commissioner's letter of April 6, 1925 is all that such claim calls for and the fact
52 that nothing further was done in regard thereto shows that it was never treated by the Commissioner as a claim for refund.

The Courts have been quite lenient in allowing amendments to cure formal defects in imperfect or defective claims for refund. However no case is cited by plaintiff and I know of none in which the Courts have construed an intention to file a refund as the actual filing of such. The case of Waters v. United States, 12 Fed. Supp. 658, is very similar to the instant case. There the District Court for the Western District of Michigan held that a letter from a taxpayer protesting additional income taxes and stating taxpayer intended to file claim for refund was not an informal or defective claim sufficient to stop the running of the statute of limitations. The Court said:

"As stated, the record fails to disclose evidence that the commissioner treated the letter in the present case as a claim for refund. In not so regarding it, he was justified by the plain language of the letter and by the conduct of the taxpayer in failure to file claim for refund for over four years thereafter. By express terms of the letter, the only action contemplated or called for was by the taxpayer himself. It fails to request action or to suggest the need for action on the part of the commissioner.

"While the rule has long prevailed that revenue laws are to be construed strictly in favor of the taxpayer and against the taxing power, it would be folly to hold generally that the mere expression of an intention to file a claim constitutes the filing of such claim. To attribute such a forced and artificial sense to the word 'intend' would be to invite an avalanche of litigation based upon ill-founded and irrelevant statements gleaned from correspondence which at the time of its inception had no bearing upon the contentions later made."

This case was affirmed by the Circuit Court of Appeals for the Sixth Circuit without opinion, and I think that decision is binding on this Court. In the case at bar, as in the Waters case, by the express terms of the letter of protest, the only action contemplated was called for by the taxpayer herself. It fails to

request action or suggest the need for action on the part of the Commissioner.

53 It has been clearly established that the filing of a timely claim for refund is a condition precedent to the right to recover overpayment of income tax. The sovereign has imposed this as a condition upon which it consents to be sued and this Court must abide thereby. Rock Island & C. R. R. v. United States, 254 U. S. 141; Rand v. United States, 249 U. S. 503; Aladdin Co. v. Woodworth, 43 F. (2d) 150 (E. D. Mich. N. D.) and cases therein cited.

I must, therefore, conclude that plaintiff's letter of protest of March 24, 1925, did not constitute an informal or defective claim for refund subject to amendment, and that the first claim for refund was that filed in September of 1928, which was more than five years after payment as allowed by Section 284 (h) of the Revenue Act of 1926 expired and hence plaintiff's cause of action is barred by Section 3226 of Revised Statutes and must be dismissed.

It is unnecessary to decide the other points raised by plaintiff's motion to dismiss.

ERNEST A. O'BRIEN,
United States District Judge.

Dated February 18, 1939.

In United States District Court

Order of dismissal

Entered February 27, 1939

54 This cause having come on to be heard upon motion of the defendant to dismiss plaintiff's cause of action, and arguments having been made by both parties and briefs having been submitted, and the Court being fully advised in the premises, and having given full consideration to said arguments and briefs, and having entered its opinion herein, deciding that said cause of action should be dismissed.

Therefore, on motion of J. Thomas Smith, Assistant United States Attorney, attorney for defendant,

It is ordered, adjudged and decreed that the defendant's motion to dismiss be and the same is hereby granted, and that said cause of action be and the same is hereby dismissed.

ERNEST A. O'BRIEN,
United States District Judge.

In United States District Court

Notice of appeal

Filed May 3, 1939

To the above named defendant:

Notice is hereby given thtat Alice G. Kales, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit, from the final order dismissing plaintiff's cause of action filed and entered in this action on February 27, 1939.

BEAUMONT, SMITH & HARRIS,
Attorneys for Alice G. Kales,
2900 Union Guardian Building, Detroit, Michigan.

Dated May 3rd, 1939.

35 In United States District Court

Appellant's designation of contents of record on appeal and statement of points to be relied upon

Filed May 4, 1939

Comes now the Appellant in the above entitled cause and hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Calendar entries.
2. Plaintiff's Petition filed July 7, 1936.
3. Proof of Service on the Attorney General filed July 20, 1936.
4. Proof of Service on United States Attorney filed July 20, 1936.
5. Special Appearance of United States of America.
6. Defendant's Motion to Strike paragraph 3 (j) of Plaintiff's Petition filed September 28, 1936.
7. Defendant's Motion to Make More Definite and Certain, filed September 28, 1936.
8. Order Granting Defendant's Motion to Strike, entered October 19, 1936.
9. Order Granting Defendant's Motion to Make More Definite and Certain, entered October 19, 1936.
10. Plaintiff's Amended Petition, filed November 2, 1936.
11. Defendant's Motion to Dismiss, filed December 4, 1936.

12. Affidavit in Opposition to Motion to Dismiss filed January 14, 1937.

13. Opinion of the Court filed February 18, 1939.

14. Order of Dismissal filed and entered February 27, 1939.

Appellant states that the points she intends to rely upon are as follows:

(a) The Court erred in granting Defendant's Motion to Dismiss.

(b) The Court erred in concluding that Plaintiff's letter
56 filed with the Commissioner on March 24, 1925 (Exhibit B attached to Plaintiff's Amended Petition) did not constitute an informal or defective claim for refund subject to amendment, but was merely a protest with a statement of intention to later file a claim in the event certain contingencies happened in the future.

(c) The Court erred in concluding that Plaintiff's cause of action was barred by Section 3226 of the Revised Statutes, and must be dismissed.

(d) The Court erred in concluding that the record was devoid of anything showing that the Commissioner of Internal Revenue or the taxpayer acted upon said letter of March 24, 1925, or in any way regarded it as other than a protest; whereas it is specifically alleged in paragraph 3 (n) of the Amended Petition, that the Bureau of Internal Revenue, through its General Counsel and its officers and agents, had always treated the amendment (Exhibit D attached to Plaintiff's Amended Petition) and the refund claim of March 24, 1925 as claims, from the time they were filed. Said conclusion is also contrary to the allegations contained in paragraph 3 (m), wherein it is alleged that a hearing was held on the amended refund claim of March 24, 1925 before the General Counsel for the Bureau of Internal Revenue on June 13, 1929, and to the statements of fact contained in the affidavit filed in opposition to the motion to dismiss, in which affidavit it is stated that at said hearing the General Counsel for the Bureau of Internal Revenue stated "that they were satisfied that said protest was sufficient to constitute an informal claim for refund, and that it was filed within the statutory period," and in which affidavit it also stated that a member of the staff of the General Counsel for the Bureau of Internal Revenue had recommended to the former General Counsel Charest, that plaintiff's claim for refund be allowed. The aforesaid conclusion is also contrary to the recitals contained in Exhibits E, F, G, H and L, wherein it appears that from June 5, 1929 up to and including August 20, 1935, said

letter of March 24, 1925 was repeatedly referred to and treated as a refund claim.

(e) The Court erred in concluding that the refund claim filed on June 4, 1925 in the amount of $2,627,309.05 made no mention of the amount claimed in this suit, whereas the provisions of said refund claim of June 4, 1925 are not set
57 forth in the pleadings or in any documents filed in said cause, and necessarily the Court could not know what said refund claim of June 4, 1925, did or did not contain until the same is introduced in evidence on the trial of said cause.

(f) The Court erred in concluding that if plaintiff had considered said protest of March 24, 1925, as a claim for refund, it would have been unnecessary to have filed the refund claim of June 4, 1925.

(g) The Court erred in concluding that plaintiff's first claim for refund was that filed in September 1928 and hence plaintiff's cause of action was barred by Section 3226 of the Revised Statutes and must be dismissed.

(h) The Court erred in granting Defendant's Motion to Strike the allegations in paragraph 3 (j) of Plaintiff's original petition.

(i) The Court erred in granting Defendant's Motion to Make More Definite and Certain, and in ordering plaintiff to attach to her petition a copy of the protest or claim for refund filed on March 24, 1925 (Exhibit B attached to Plaintiff's Amended Petition), and to attach a copy of the communication received by plaintiff from the Commissioner of Internal Revenue acting upon said protest or claim for refund (Exhibit C attached to Plaintiff's Amended Petition).

Dated May 3rd, 1939.

BEAUMONT, SMITH & HARRIS,
Attorneys for Appellant, Alice G. Kales,
2900 Union Guardian Bldg., Detroit, Michigan.

Service of Appellant's Designation of Contents of Record on Appeal and Statement of Points to be Relied Upon is hereby acknowledged this 3rd day of May, A. D. 1939.

JOHN C. LEHR,
United States Attorney,
By J. THOMAS SMITH,
Assistant United States Attorney,
Attorneys for Defendant and Appellee.

58 In United States District Court

Stipulation re abridgement of transcript of record and waiver of comparison thereof

Filed June 1, 1939

It is hereby stipulated by and between the attorneys for the respective parties hereto, that plaintiff's original Petition may be abridged in the printed record to omit the parts thereof appearing in plaintiff's Amended Petition and in defendant's Motion to Strike.

It is further stipulated and agreed that the Transcript of Record as presented to the Clerk by the printer may be certified by the Clerk of the District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit, as a true, full, and complete copy of the original pleadings, papers, and orders in said cause, without further comparison by the Clerk.

BEAUMONT, SMITH & HARRIS,
Attorneys for Appellant.

JOHN C. LEHR,
United States Attorney,

By J. THOMAS SMITH,
Assistant United States Attorney,
Attorneys for Appellee.

Dated Detroit, Michigan, May 31, 1939.

59 Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause argued and submitted

October 14, 1940

Before SIMONS, ALLEN, AND HAMILTON, JJ.

This cause is argued by L. A. Masselink and Hal H. Smith for Appellant and by M. S. Zimmerman for Appellee and is submitted to the court.

Judgment

Entered November 9, 1940

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for proceedings consistent with the opinion of this court.

Opinion

Filed November 9, 1940

Filed Nov. 9, 1940. John W. Menzies, Clerk.

United States Circuit Court of Appeals, Sixth Circuit

No. 8341

ALICE GRAY KALES, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

Decided November 9, 1940

Before SIMONS, ALLEN, and HAMILTON, Circuit Judges.

HAMILTON, Circuit Judge. Appellant's action to recover income taxes alleged to have been overpaid for the calendar year 1919

was dismissed, from which order she prosecutes this appeal. The facts out of which the controversy arises are undisputed and substantially as follows:

Prior to March 1, 1913, appellant was the owner of 535 shares of Ford Motor Company stock. Its majority stockholder made an offer to purchase the stock of the minority and on or about May 19, 1919, the Commissioner of Internal Revenue, at the request of the stockholders, determined the March 1, 1913, value of each share to be $9,489.34. Thereafter on July 7, 1919, appellant sold her stock for $12,500.00 per share and on March 25, 1920, filed her income tax return for the calendar year 1919 and reported the profit on the sale in accordance with the Commissioner's determination of March 1, 1913, value, showing taxes due in the amount of $1,216,086.26, which she paid to the Collector of Internal Revenue in quarterly installments.

In March 1925, the Commissioner of Internal Revenue, on audit and review of her return, redetermined the March 1, 1913, value of the stock to be $2,634.00 per share and accordingly made a jeopardy deficiency assessment against her of $2,627,309.05, all of which she paid to the Collector of Internal Revenue under protest, at which time she addressed and mailed a letter to him and sent a copy to the Commissioner, the first eight paragraphs of which stated grounds of protest against the payment of the assessment. Paragraphs 9 and 10 related to an overpayment on her original return and are material to the question here.[1]

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[1] "9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913, was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

"10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

On April 6, 1925, the Commissioner advised the appellant that his office was in receipt of her protest against the assessment of the deficiency in taxes as levied against her for the year 1919 in the amount of $2,627,309.05, but in view of the fact that the statutory time for collection was about to expire, an immediate assessment was imperative and she could file a claim of abatement with the Collector in ten days, which would be given prompt consideration. On June 4, 1925, appellant filed with the Commissioner a claim for refund for the $2,627,309.05 additional assessment, which was rejected, and she sued and recovered that amount against the Collector to whom it had been paid. Woodworth v. Kales, 26 F. 178 (C. C. A. 6).

On May 5, 1928, the Board of Tax Appeals, in the case of Couzens (another stockholder of the Ford Motor Company), 11 B. T. A. 1040, fixed the March 1, 1913, value of the Ford stock at $10,000.00 per share and on September 24, 1928, appellant filed with the Commissioner, on a form provided by him, what she designated "amendment to claim for refund filed March 24, 1925," in which she adopted the findings of the Board of Tax Appeals as to the March 1, 1913, value of the stock as found in the Couzens case, which showed an overpayment of taxes on her original return of $195,710.44. This claim was retained in the Commissioner's office and thereafter several conferences were had with the General Counsel's office in the Bureau with relation to it. On August 20, 1935, the Commissioner advised the appellant that the records of the Bureau indicated that she had filed a judgment claim dated September 2, 1928, in the sum of $2,627,309.05 based upon the decision in the District Court of Michigan, affirmed by this court on May 10, 1928, and that she had also filed September 21, 1928, a form purporting to be an amendment to a claim for refund filed March 24, 1925, seeking a further refund of $195,710.44. He advised that the refund claim filed in 1925 was merged into the judgment secured and that she was therefore precluded from filing an amendment to the earlier claim, which had been finally adjudicated, and since the so-called amendment was not treated as a claim, there was no necessity for a disallowance.

Appellant instituted this action July 7, 1936, and on motion of appellee, it was dismissed on the ground that her claim was barred by the Statute of Limitations; hence this appeal.

Two issues are presented: (1) Whether appellant's letter of March 24, 1925, to the Collector of Internal Revenue constituted an informal claim for refund, and (2) If such letter constituted such claim, whether it was rejected by the letter of the Commissioner of Internal Revenue dated April 6, 1925.

R. S. 3226, as amended, U. S. C. A. Title 26, Sec. 1672, Internal Revenue Code, 3772, provides no suit or proceeding shall be maintained in any court for the recovery of any Internal Revenue tax until a claim for refund has been duly filed with the Commissioner of Internal Revenue in accordance with the law and regulations.

R. S. 3228, as amended, U. S. C. A. Title 26, Sec. 4433, Internal Revenue Code, 322 (b) (1) provides that no refund shall be allowed unless before the expiration of a period of four years from the time the tax was paid a claim therefor has been filed by the taxpayer. Section 284 (h) of the Revenue Act of 1926 (44 Stat. 9) extends the time for the filing of claim for refund for 1919 taxes to five years from the date the return was due. Treasury Regulations 65, Article 1396, promulgated under the Revenue Act of 1934 and applicable here, provides that claims by the taxpayer for the refunding of taxes shall be made on form 843 and all facts relied on under the claim should be clearly set forth under oath. Treasury Decision 4266, promulgated March 27, 1929, authorizes the Commissioner to make a refund after the expiration of the statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which an informal or defective claim duly filed prior to the expiration of the period of limitation and stating specifically the grounds for the refund, is perfected by the filing of a claim prior to May 1, 1929.

It is settled law that where a claim rejectable as too general and as omitting to specify matters needing investigation has not misled the Commissioner, but has been the basis of an investigation disclosing facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, is permissible. United States v. Andrews, 302 U. S. 517, 534.

In the administration of Internal Revenue Laws, we are concerned with substance and not form. The prerequisite refunding statutes requiring claim for refund before suit, should receive a practical construction to effectuate their purpose. The income tax law is complex and does not always permit a determination of the taxpayer's liability in the first instance. Inevitable mistakes occur. Statutory provision is made for the adjustment of the tax where understated by the taxpayer and as a corollary a statutory method is provided to relieve a taxpayer from overstatements. It is vital to the functions of government that taxes be collected promptly and if errors in returns are made that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, without being subjected to the delay and expense of litigation and any timely claim showing intention to ask a refund

of taxes allegedly overpaid and the grounds therefor is sufficient to answer that purpose.

In considering the sufficiency of the claim, proper consideration should be given to its spirit and purpose and the surrounding facts and circumstances in the light of the statute. Applying this rule to the case at bar, appellant stated in her letter that she protested the assessment of the deficiency and was paying it under duress and solely to prevent the imposition of penalties and threatened attachment of her property.

The first eight paragraphs of her letter recited the fact that in making her original return she had accepted the Commissioner's March 1, 1913, value of the Ford stock in good faith and relied on it in making the sale and for that reason the United States was estopped from reopening, reversing or setting aside the previous determination of the value of the stock by the Commissioner.

In appellant's action for the recovery of the deficiency assessment, she relied on three grounds, (1) estoppel in her favor against the later attempted revaluation, (2) that the assessment made by the Commissioner for 1919 based upon this valuation and its later approval by his office, established that value beyond the power to reopen and reconsider except for a good cause which was nonexistent, and (3) that the deficiency of 1925 which had required the disputed payment, was void for lack of jurisdictional basis, and she was sustained by this court on the second ground. Woodworth v. Kales, supra. That action was against the Collector of Internal Revenue to whom she had paid the deficiency and as the original tax which she now seeks to recover was paid to another Collector, she could not have litigated in her former action the issue she now raises. Smietanka v. Indiana Steel Company, 257 U. S. 1; Routzahn v. The Reeves Bros. Company, 59 F. (2d) 915 (C. C. A. 6).

Paragraphs 9 and 10 of the letter were alternatives to paragraphs 1 to and including 8. In substance, appellant stated that if the Internal Revenue Bureau, the Board of Tax Appeals or any court having jurisdiction of the subject matter, should decide that the United States was authorized to change the valuation fixed by the Commissioner of Internal Revenue before she sold her stock, then she had the right, and would show, that the valuation so fixed was substantially less than the fair market value of the stock March 1, 1913, and that she was entitled to recover such portion of the tax as was originally paid by her due to the undervaluing of the stock.

Appellant's letter was more than a protest or a statement of an intention to file a claim later in the event certain contingencies should arise. It was clear notice to the Commissioner that if he reversed his decision as to the value of the stock she was claiming

a refund of that part of the original tax paid by her, because of her March 1, 1913, undervaluation of the stock. Her statement was in the nature of a counterclaim. The claim she urges here did not mature until the March 1, 1913, value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction. A taxpayer may state as many grounds for refund as he wishes regardless of consistency, provided facts are disclosed on which the Commissioner may act. Compare Reynolds v. McMurray, 77 F. (2d) 740 (C. C. A. 10); Ferguson v. United States, 27 F. Supp. 1012, Ct. Cl.

There is a class of claims for refundment of taxes in which, through no fault of his own and often through the fault of the Commissioner, the taxpayer does not know which of two or more inconsistent grounds he may succeed in proving, either of which will entitle him to refundment. In such cases, the taxpayer cannot allege facts without qualification but may state them in the alternative so that the Commissioner, in considering his grounds, will not be left in the dark as to the facts on which the taxpayer relies, but within limits, which would exclude abuses, the right of the taxpayer to set up alternative grounds for refundment is clearly recognized. The analogy is found in General Rules of Pleading [Rule 8 (e) of Federal Rules of Civil Procedure]; United States v. Richards, 79 F. (2d) 797 (C. C. A. 6).

The appellant's claim falls clearly within the above classification. She was willing to let the Commissioner's former determination of the March 1, 1913, value of the stock stand, but if he proposed to re-examine and withdraw his former decision, she proposed, in the alternative, to show facts which would be to her advantage. The Commissioner re-examined the whole subject matter and in so doing was required to redetermine the March 1913 value of the stock as though it had not theretofore been done.

We are of the opinion that appellant's letter of March 24, 1925, constituted an informal claim, which the Commissioner did not reject for failure to comply with the Treasury Regulations and when considered in the light of all the facts and circumstances existing at the time, the formal refund claim filed by appellant September 11, 1928, and accepted and considered on its merits by the Commissioner, was but a perfection of the informal claim and not a new and independent one. Night Hawk Leasing Company v. United States, 18 F. Supp. 938, Ct. Cl. 1; Lasher v. United States, 65 Ct. Cl. 295; In re Baltimore Pearl Hominy Company, 5 F. (2d) 553 (C. C. A. 4); United States v. Factors Finance Company, 288 U. S. 89, 94. Compare Georgia, Florida & Alabama Railway Company v. Blish Company, 241 U. S. 198.

The case of Waters v. United States, 12 Fed. Supp. 658, relied on by appellee is not applicable here. There the Commissioner assessed the tax deficiency; the taxpayer wrote a letter of protest without paying the tax in which it was stated: "I intend to file claims for refund immediately for these additional taxes." The tax not having been paid at the time the letter was written, it could not be characterized as a claim for refund. In the case at bar all the taxes had been paid at the time the letter was written and no reference in it could be construed fairly as applying to unpaid taxes.

Appellee's contention that the Commissioner's letter of April 6, 1925, constituted a rejection of appellant's informal claim is without merit. This communication, when fairly construed, relates exclusively to the additional assessment referred to in the first eight paragraphs of her letter. The Commissioner advised appellant that, under the provisions of Section 279 (a) of the Revenue Act of 1924, she could file a claim for abatement within ten days. A claim in abatement is applicable only to taxes which have been assessed and not yet paid. Construing the letter in the light of the Statute, it is clear that the Commissioner's office labored under the misapprehension appellant had not paid the deficiency assessment. The letter made no reference either directly or indirectly to paragraphs 9 and 10 of appellant's communication of March 24, 1925, which related entirely to taxes voluntarily paid on her original return.

The Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it on a ground abandoned in this action and we are of the opinion that her cause of action was not barred by any applicable statute of limitation.

Judgment reversed for proceedings consistent with this opinion.

Petition for rehearing

Filed December 4, 1940

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Order denying petition for rehearing

Entered December 10, 1940

Appellee's petition for rehearing is denied.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of Alice Gray Kales vs. United States of America, No. 8341, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 28th day of February A. D. 1941.

[SEAL] J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Supreme Court of the United States

Order allowing certiorari

Filed April 28, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 45,175. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 826. The United States of America, Petitioner, vs. Alice Gray Kales. Petition for a writ of certiorari and exhibit thereto. Filed March 8, 1941. Term No. 826 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941